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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 477

RKO GENERAL, INC.,

Petitioner,

v.

MARGOT NEWMARK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Counterstatement of Questions Presented

(1) Should an insider, who made a cash purchase of his issuer's securities and within six months exchanged those securities at a profit for securities of a different company in a merger, be exempt from Section 16(b) of the Securities Exchange Act of 1934 where the insider controlled the occurrence of the merger and was in possession of information unavailable to the general public, on the theory (a) that an exchange pursuant to a merger can never be a "sale," or (b) that the profit was not "realized" because the insider did not thereafter sell the second company's securities?

(2) Should this Court grant a writ of certiorari to decide a question which was not raised in or considered by the Court of Appeals, namely whether the CAB's approval of a merger of two airlines foreclosed the courts from finding that an insider violated Section 16(b) of the Securities Exchange Act of 1934 in the course of and incidental to such merger?

Statement of the Case

1. The Facts on Which the Judgment is Based

On May 3 or 4, 1967, petitioner RKO General, Inc. ("RKO") contracted to purchase a controlling block of securities of Central Airlines, Inc. ("Central"), knowing of a proposed merger of Central into Frontier Airlines, Inc. ("Frontier") (JA 258a, 404a).* On the same day Frontier, which RKO controlled through the ownership of 56 percent of Frontier's outstanding shares, entered into an agreement with Central, whereby Central was to be merged into Frontier, by an exchange of stock, the surviving corporation to be Frontier (JA 264a Ex "A" p. 1).

At the time that the purchase contract was executed, neither the public nor the outside shareholders had been informed of the proposed merger (JA 258a). The following day the financial press reported the proposed merger and for the first time it was also disclosed that RKO had contracted to purchase Central securities (JA 398a, 258a).

RKO's consummation of these two contracts (the "purchase agreement" and the "merger agreement") on September 18, 1967, resulted in the substantial profit in Central securities which the judgment below requires RKO to yield pursuant to Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b):

* "JA" refers to the Joint Appendix in the Court of Appeals.

The purchase contract fixed the price at which RKO could purchase the Central securities at $8.50 per share of common (JA 276a). It also assured shareholder approval of the merger for it obliged the majority shareholders of both corporations to vote in favor of the proposal (JA 277a, 264a, p. 3).

As the Court of Appeals observed:

> "RKO's contract to purchase Central shares is a classic example of trading while in the possession of information unavailable to the general public. * * * RKO was in an ideal position to take speculative advantage of [the] rise [in price occasioned by release of the proposed merger agreement] by purchasing Central securities at a price established in the purchase agreement before public disclosure of the proposed merger and disposing of these securities after disclosure had caused them to increase in value." (PA 7a-8a).*

Under the merger agreement, Central was to be merged into Frontier on the basis of an exchange of one share of Frontier common stock for each 3½ shares of Central common. The representatives of Frontier (RKO's subsidiary) were given "free and full access to the books and records of Central" (JA 264a Ex. "A" p. 4). It was also provided that the merger could be abandoned at any time prior to its effective date, whether before or after stockholder approval (JA 264a Ex. "A" pp. 7-8).

Consummation of the merger was conditioned upon approval by the Civil Aeronautics Board ("CAB"). However, if, in RKO's "good faith judgment" (JA 277a), the subsidy to be awarded to the surviving company by the CAB was inadequate or if any of the other conditions im-

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* "PA" refers to the Appendix annexed to the Petition.

posed by the CAB adversely affected the interests of RKO, Frontier or Central, the contract granted RKO the right to abandon the purchase and merger.

On September 1, 1967, the order of the CAB's hearing examiner approving the merger became final, subject to the acceptance by Frontier of the amount of the subsidy to the new company and the other conditions imposed upon the merger by the CAB. RKO thereafter "had the power to determine when or, for that matter, if the purchase and merger would take place" (PA 9a). RKO's favorable speculative posture was described by the Court of Appeals as follows:

> "RKO had no obligation to purchase the Central shares unless, in its 'good faith judgment,' the subsidy granted the merged airline by the CAB was satisfactory. It was thus in a position to maximize its speculative gain in Central shares by withholding its expression of satisfaction with the subsidy until the rise in the price of both Central and Frontier shares fully reflected the impending merger. At the same time, it should be clear that RKO's power to reject the subsidy would have enabled it to escape any possible loss in Central securities." (PA 9a).

On September 18, 1967, RKO consummated its purchase of Central securities by delivering its check for $7,550,082.50 to the selling stockholders. On the same day, the merger agreement was filed with the Secretary of State of Nevada, effecting the merger (JA 239a). RKO thereby exchanged its Central securities for a control block of Frontier securities, valued by the courts below at $15,470,764 (PA 50a).

2. Proceedings Below

a. The District Court

In an opinion and order dated December 6, 1968, the District Court for the Southern District of New York

(Tyler, J.) denied RKO's motion for summary judgment and granted plaintiff's cross-motion for partial summary judgment on liability.

Thereafter, a trial on the issue of damages was held before Judge Bonsal. He found that RKO realized a profit of $7,920,681.58, representing the difference between the cash purchase price paid by RKO for its Central securities and the value of the Frontier securities received by RKO on the merger, which included the control value of the Frontier securities. On October 2, 1969, he entered judgment accordingly.

b. *The Court of Appeals*

On RKO's appeal, the judgment of the District Court was unanimously affirmed by the Court of Appeals for the Second Circuit.

In its opinion, the Court of Appeals held that RKO's purchase and subsequent exchange of Central securities for securities of Frontier lent itself to speculative abuse in at least two ways:

> "In sum, the purchase and subsequent exchange of Central shares were fraught with opportunities for the kind of speculative abuse section 16(b) was intended to abort. RKO's success in fixing the purchase price before the proposed merger became public knowledge opened the door to possible speculative gains. Its ability to determine whether and when the merger would be consummated enabled it to maximize these gains or, at the very least, to avoid any loss." (PA 9a)

The court then addressed itself to RKO's contention "that the exchange did not fundamentally alter the nature of its holdings and therefore that it cannot fairly be characterized as a sale," which contention, the Court noted, relied on

"the 'economic equivalence' test of *Blau* v. *Lamb*, [363 F.2d 507 (2d Cir. 1966)], where we held that the conversion of preferred stock to common stock was not a sale under 16(b) since 'that which the insider [surrendered] and that which he [received were] simply different forms of the same participation in his issuer.' 363 F.2d at 523." (PA 10a-11a). The court responded that *Lamb* itself had declared the principle which renders the "'economic equivalence' exemption * * * inapplicable to this case":

> "The doctrine of economic equivalence is applicable only to exchanges involving the securities of a single issuer; we stated clearly that 'sales or purchases by an insider of his issuer's securities for cash, *the securities of a different company*, or other property are within the reach of Section 16(b) * * *.' 363 F.2d at 523 (emphasis added). When RKO exchanged its Central shares for Frontier securities it received 'the securities of a different issuer,' which represented ownership rights in the new merged airline." (PA 11a) (emphasis in original).

RKO's contention that it had not realized any profit was thus rejected:

> "Whether, upon divestment, the insider receives cash or property should be immaterial; if the statute is to achieve its end what is significant is that he has attempted to turn a short swing in the price of his issuer's securities to his own personal advantage. RKO purchased Central securities for some 7.5 million dollars. In return for these securities, it received Frontier shares worth more than 15 million dollars. The receipt of these shares was a sufficient realization of profit to place the transaction within the scope of section 16(b)." (PA 12a-13a).*

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* The Court also held that RKO became a 10% "beneficial owner" and hence an insider of Central prior to its purchase of Central securities (PA 14a).

RKO filed a petition for rehearing en banc which was denied without dissent (PA 53a).

ARGUMENT

I. The Petition Raises No Question of General Importance

The circumstance that this "case involves by far the largest monetary judgment ever entered in a Section 16 (b) case" (Pet. p. 16) is not the variety of importance which justifies the granting of the Petition. Recognizing this, petitioner has sought to give the case an aura of importance by recasting the transactions on which its liability is based so as to raise issues not presented by the facts and to give the appearance of a conflict in the decisions which does not exist. In fact, no court has ever held that mergers or exchanges of shares of different companies are outside 16(b).

a. This Case Involves Unique Facts

Warning of "distortions in important commercial transactions affecting thousands of shareholders" (Pet. p. 18), RKO urges the Court to relieve it of liability by exempting all mergers from 16(b). (Pet. p. 23). The judgment below does not jeopardize "ordinary, perfectly proper commercial transactions" (Pet. p. 18). Nothing that was decided below would interfere with run-of-the-mill mergers.

The decision below is based on the unique transactions involved here. The Court concluded that RKO's purchase prior to the merger and its subsequent exchange of Central shares "were fraught with opportunities for the kind of speculative abuse section 16(b) was intended to abort" (PA 9a). RKO was found liable because this particular statutory merger was a product of interrelated "purchase and merger

agreements" which RKO could abandon or consummate and which therefore "placed RKO in a position which must be the dream of every speculator—'Heads I win, tails I do not lose.'" (*ibid.*).

As the court below held (PA 8a-9a), these agreements not only enabled RKO to purchase Central securities at a price established prior to the disclosure of the proposed merger and to avoid the purchase if subsequent events were to make the merger unprofitable for RKO, they also gave RKO inside knowledge of the affairs of Central and control over the timing and ultimate fate of the merger.

Moreover, the Central shareholders were subject to risks not attendant upon the ordinary statutory merger. A merger is usually consummated once it has been approved by the shareholders of the constituent corporations. Even where the parties retain the right to abandon the merger, ordinarily the insiders of each corporation make independent judgments as fiduciaries on behalf of the shareholders of each corporation. But here, RKO was empowered to make that decision for both sides because the dominant Central shareholders had surrendered to RKO in the purchase agreement control over the fate of the merger. Thus, RKO could have made its decision to purchase and merge or not to purchase and merge for considerations beneficial to itself rather than in the interests of the public Central stockholders.

Even as the ordinary statutory merger does not necessarily create the possibility of speculative abuses, neither does it of itself contain all of the elements necessary before liability can attach under Section 16(b). If the transaction herein involved only a statutory merger of Frontier and Central without any purchase of Central securities within

six months thereof, as petitioner's questions imply, there would have been a "sale" of the Central securities by their exchange into Frontier shares but no "purchase" of the Central securities.

Thus, the decision below establishes no general principle that statutory mergers will always be covered by Section 16(b). On the contrary, it is RKO which must seek to exempt all statutory mergers from 16(b) (Pet. pp. 2, 23), since no narrower rule would relieve it of liability.

b. No Conflict of Decisions Exists

Petitioner asserts that the decision below is in conflict with this Court's decision in *Blau* v. *Lehman*, 368 U.S. 403, and with those of various Courts of Appeals (Pet. pp. 17 *et seq.*).

RKO's reliance on *Blau* v. *Lehman*, involving the question of deputization of a director, is based not on anything that was there decided, but on an asserted difference in "approach" between this Court's opinion and the decision below (Pet. pp. 18, 23). No inconsistency appears. The "reach of Section 16(b)" was not "limited" (Pet. p. 18) in *Lehman*; the Court simply held that it would not broaden the categories of persons on whom liability would be imposed when the statutory language and the legislative history of the statute established that Congress had deliberately declined to do so (368 U.S. at 411-12).

Nor is the decision below in conflict with decisions of other Courts of Appeals. No court has ever refused to apply 16(b) to a purchase and merger transaction, nor does the Petition point to any such decision. On the contrary, all cases which have dealt with the subject of exchanges of

securities of one issuer for the securities of another issuer whether by mergers or other types of exchanges have held that under 16(b) such exchanges and mergers constitute a "purchase" of the securities acquired and a "sale" of the securities surrendered. *Blau* v. *Mission Corp.*, 212 F.2d 77 (2d Cir. 1954), *cert. denied* 347 U.S. 1016; *Booth* v. *Varian Associates*, 334 F.2d 1 (1st Cir. 1964), *cert. denied* 379 U.S. 961; *Marquette Cement Mfg. Co.* v. *Andreas*, 239 F.Supp. 962 (SDNY 1965); *Blau* v. *Hodgkinson*, 100 F.Supp. 361 (SDNY 1951).

Striving to create a conflict in the decisions where none exists, RKO attempts to confuse this transaction, involving an exchange of securities of two different corporations, with *intracorporate* transactions such as conversions and recapitalizations. Where, as here, the securities of different corporations are exchanged, the fact that the securities surrendered and received represent investments in different enterprises with different risks and opportunities and the fact that the insider is no longer subject to the market risks in the securities surrendered, compel the conclusion that such exchanges are purchases and sales.

Although there is no conflict among the Circuits with respect to the issues raised by this case, a division in *approach* has grown up between a "pragmatic" and an "objective" test under Section 16(b). Under the "pragmatic" approach, the courts have adopted the standard stated in *Ferraiolo* v. *Newman*, 259 F.2d 342, 345 (6th Cir., Stewart, J.):

> "Every transaction which can reasonably be defined as a purchase will be so defined, if the transaction is of a kind which can possibly lend itself to the speculation encompassed by Section 16(b)."

That standard was distilled from the decisions of the Second Circuit (see 259 F.2d at 344-45) and has also been applied by the Eighth and Ninth Circuits.* Under the "objective" approach, analysis of the possibility for speculative abuse is unnecessary, and a purchase and sale is found whenever a transaction comes within the literal meaning of these terms. This approach is illustrated by *Heli-Coil Corp.* v. *Webster*, 352 F.2d 156 (3d Cir. 1965), where it was held that the conversion of convertible debentures into common stock of the same company constituted a "sale" of the debentures and a "purchase" of the common under 16(b) even though the securities were economic equivalents. These are the "somewhat conflicting approaches to § 16(b) by the Court of Appeals" which Mr. Justice (then Judge) Blackmun's dissent in *Petteys* v. *Butler* (Pet. p. 22) urged this Court to resolve. This Court nonetheless denied certiorari, *sub. nom.* in *Blau* v. *Petteys*, 385 U.S. 1006, and simultaneously in *Blau* v. *Lamb*, 385 U.S. 1002, which had been decided by the Second Circuit, 363 F.2d 507. No intervening change in the law has occurred.

The instant case involving an exchange of securities of two separate companies is not an appropriate vehicle to resolve the differences between these two approaches. RKO's liability has been adjudged under the approach which is the more lenient to insiders, namely, the pragmatic approach which relieves the insider from liability where there exists no possibility of speculative abuse. Thus, this case presents no occasion for determining whether the pragmatic or objective approach to 16(b) is correct: the outcome herein could not be affected.

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* *Petteys* v. *Butler*, 367 F.2d 528 (8th Cir. 1966), *cert. denied* 385 U.S. 1006; *Blau* v. *Max Factor & Co.*, 342 F.2d 304 (9th Cir. 1965), *cert. denied* 382 U.S. 892. See also the discussion of these cases by Judge Tyler in the District Court (PA 25a-26a).

II. The Judgment Below Was Correct

Part II of the Petition (pp. 26-39) is nothing else than an elaborate reargument of the merits of the case. This case raises no question of general applicability, let alone importance; review would be unwarranted even if the judgment below were arguably wrong. That the judgment was correct appears most clearly from the opinions of the District Court and the unanimous Court of Appeals.

A. The basic thesis of the Petition is that RKO engaged in a "single investment transaction" (Pet. p. 26), namely, an investment in "Central-Frontier securities." * As the point is stated at Pet. p. 31:

> "Essentially there was but one transaction. It was immaterial as a practical matter whether the merger took place before the stock purchase or vice versa. In either case, the ultimate result was the same: RKO was purchasing Central-Frontier securities."

RKO's representations to the Internal Revenue Service were otherwise:

> "There were two separate and wholly unconnected objectives involved in the total proposal: the desire of RKO to acquire some Central shares as an investment, and, second, the merger of the two airlines.
>
> * * * * *
>
> "It is submitted that the two separate transactions involved, i.e., the merger and the stock purchase, were both motivated by clearly bona fide business purposes and neither had as its principal purpose the reduction of Federal taxes." (JA 356a-357a).

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* Since RKO refers throughout to "Central-Frontier securities," we note, at the risk of belaboring the obvious, that no such securities ever existed, and there has never been a "Central-Frontier" company. While RKO seizes on Judge Tyler's reference to post-merger Frontier as "Central-Frontier" (Pet. p. 5, n. 1), he did so only "[f]or convenience" (PA 19a).

This recasting of the transactions in the Petition, which is designed to foster the illusion of a single, long-term investment in Frontier, short-circuits the purchase of the Central securities pursuant to the purchase agreement and the sale of the Central securities pursuant to the merger agreement.

B. Additionally, RKO contends that when it purchased Central securities its only purpose was to purchase securities of the merged company and that it was not motivated by profit when it entered into the transaction (Pet. p. 29). This contention ignores the fact that 16(b) applies irrespective of the insider's motive or intent. The principle which governs decision under 16(b) is stated by Chief Justice (then Judge) Burger in *Adler* v. *Klawans*, 267 F.2d 840, 845 (2d Cir. 1959):

> "Unlike a criminal statute where intent would be an essential ingredient this statute renders the subject accountable for proscribed profits regardless of intent."

C. In order to establish that it "never realized any profit," RKO contends that the Central shares it purchased were the "economic equivalent" of "the securities of the merged company" asserting that the Court of Appeals did not explain why they were not (Pet. p. 36). This is not so (PA 10a-11a). The Court of Appeals' explanation was that Central and Frontier securities were not economically equivalent because they represented ownership in two different corporations.

The total assets of Central, as of April 30, 1967, were $14,557,000; the total assets of Frontier were $62,760,000 (JA 324). Thus, while the Central shares which RKO purchased represented ownership in a corporation with assets of less than $14.6 million, the Frontier securities

which it received in exchange on the merger represented ownership of a company with assets of more than $77.3 million. Again, Central's income in the year April 30, 1967, was $557,131; Frontier's income was $1,632,842 (JA 323). Frontier estimated that its post-merger net income would be $3.2 million (JA 327a); almost six times as much as Central's income had been.

We submit that these figures do not represent merely "a theoretical distinction between corporate entities"; but significant "facts of real economic" differences (Pet. p. 37). Indeed, this Court has determined that an investment in one company differs materially from an investment in some other company into which the first has merged. *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 467.

Since the securities exchanged here were found not to have been "economic equivalents," RKO's reliance (Pet. p. 37) on the opinion of four of eight judges in *Heli-Coil Corp.* v. *Webster, supra,* that no profits were realized upon the exchange of economically equivalent securities of the same corporation, is misplaced.*

RKO's suggestion that 16(b) liability can result only if the insider receives cash is without merit. As one court said in a 16(b) case:

> "'Profits are realized by sales or exchanges in which the value received is greater than the cost . . . of the thing parted with. It is not necessary that the profit be realized in cash; profits are regarded as realized if cash *or property* is received in the transaction' . . . We cannot believe that any accountant or legislator

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* As noted, the transaction referred to in *Heli-Coil* involved the conversion of convertible debentures into common stock of the same company, a transaction since exempted by Rule 16b-9, 17 C.F.R. § 240.16b-9 (1966), and having no counterpart in this case.

either would dispute this statement . . ." (emphasis supplied).*

RKO further argues (Pet. p. 20) that in order for a profit to be realized the property received must be "a cash equivalent" which it defines as "readily marketable securities." RKO asserts that it could not have sold the Frontier securities it received in exchange for its Central securities because of certain investment representations. Those representations meant only that RKO could not have made an unregistered public distribution. Indeed, in the District Court, RKO admitted that being in control of Frontier it could have compelled Frontier to register the securities or it could have sold the securities in a private placement (JA 130a, 138a, 151a-152a).

In any event RKO's argument that the property received must be a "cash equivalent" is not correct. For example, the receipt of a non-assignable promissory note for its Central securities having a value equal to that of the Frontier securities it actually received would not have exempted the transaction from 16(b) liability. RKO's insistence on cash on the sale side of a 16(b) transaction would open a gaping hole in 16(b).

RKO's predicate that 16(b) liability only attaches if the judgment can be paid "from sources related to the transaction" (Pet. p. 20) is without authority. Indeed, Judge Learned Hand affirmed a judgment which necessarily had to be paid from sources unrelated to the transaction when he held an insider liable for a series of purchases and sales which had resulted in a net loss. *Gratz* v. *Claughton*, 187 F.2d 46, 51 (2d Cir. 1951), *cert. denied* 341 U.S. 920.

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* *Dabney* v. *Atlas Corp.*, CCH Fed. Sec. L. Rep. ¶ 90,651 ('54-'56 decs.) (SDNY 1954).

RKO also denies that it realized a profit because the Frontier securities have declined in market price since September 18, 1967 (Pet. p. 37). However, the courts below were concerned with speculation in Central securities—not Frontier securities. By disposing of its Central securities, RKO terminated its market risk in Central securities and assumed the market risk of Frontier securities.

D. RKO not only camouflages the critical steps of the purchase and sale of Central securities, it also ignores the fact that the transaction illustrates several of the abuses which Congress sought to eliminate. In *Wolf* v. *Weinstein*, 372 U.S. 633, this Court made clear that one of the evils at which Section 16(b) was aimed was the temptation of insiders to affect or influence corporate policy for the benefit of their own securities holdings despite detriment to other interested groups (see *id.* 642). *Wolf* involved a corporate reorganization and arose under § 249 of the Bankruptcy Act, 11 U.S.C. § 649. This Court stated that:

> "Congress enacted two distinct types of sanctions to prevent these possible practices. One appears in §16(b) of the Securities Exchange Act, 15 U.S.C. §78p(b), which prohibits the realization by insiders of short-swing profits from trading in their corporation's stock, even when the corporation is solvent." (*Id.* at 643).

The Court of Appeals recognized RKO's "tempt[ation] to affect or influence corporate policies * * * for the benefit of [its] own security holdings" (*id.* at 647), for it found that one of the speculative abuses present here was that RKO had been placed in a position where it could, for its own benefit, cancel the merger even though it was advantageous to the public Central shareholders.

E. Petitioner's reliance (Pet. p. 34) on disclosure of the merger and stock purchase agreements in proxy statements to the Central and Frontier shareholders, and their approval of the merger "is no more than a red herring." *Cf.* PA 8a. Disclosure of a 16(b) violation does not cure the violation. Moreover, such disclosure as was here made was meaningless since the requisite majority approval of the merger was pre-ordained. See p. 3, *supra*. Nor, indeed, did the proxy statements constitute full disclosure of the entire transaction, for they did not disclose the terms of RKO's purchase agreement or even that approval of that agreement by the CAB was a prerequisite for the accomplishment of the merger.

F. RKO urges that there was no possibility of the speculative abuses at which Section 16(b) was aimed because the CAB said that the merger and purchase terms were "not unfair" and would have "no adverse effect on" shareholders or others. This contention, which appears in RKO's third question presented, was not advanced below,* and is therefore subject to the rule recently reiterated in *Adickes v. Kress & Co.*, 398 U.S. 141, 147, n. 2:

> "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them. *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16 (1958); *Husty* v. *United States*, 282 U.S. 694, 701-702 (1931); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927)."

No reason appears why an exception should be made here. Adherence to that rule is particularly appropriate since

* The only issue raised by RKO in the District Court was that §414 of the Federal Aviation Act exempted the transactions herein from §16(b) of the Securities Exchange Act. This contention was rejected by Judge Tyler (PA 33a-35a) and was abandoned in RKO's brief in the Court of Appeals.

RKO argues that the lower courts should have given the CAB's findings conclusive effect (Pet. p. 39).

In any event, the point is without substance. That the CAB plays no role in the administration of the Securities Exchange Act hardly requires comment. Further, the CAB never considered or made findings regarding RKO's short-swing profits; nor did it purport to determine whether RKO used inside information in connection with its decision to consummate the merger. Thus, no collateral attack on any findings of the CAB was made below. The discharge of the CAB's functions under the Aviation Act of 1958 was complete when it permitted the merger of the two airlines. Nothing that was decided by the CAB could relieve the courts below of their responsibility to apply Section 16(b) to the facts of this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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